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ISSUED BY THE MASSACHUSETTS BAR ASSOCIATION

THE LEADING FIGURES OF THE MASSACHUSETTS LAW INSTITUTE AT SWAMPSCOTT ON MAY 8 AND 9, 1942

PHILIP A. HENDRICK, *Chairman*

GUY NEWHALL of Lynn

Chairman of the special Committee on Probate Practice and Procedure —a Vice-President of the Massachusetts Bar Association and author of the well-known book on "The Settlement of Estates," who will open the discussion of Probate Practice on Friday, May 8th.

HON. HUGH D. McLELLAN

Every one knows Hugh McLellan, who was appointed United States District judge in 1932, after long experience as trier of cases, and, following a distinguished service as a Federal judge of first instance, has recently resigned and returned to active practice. He will talk on Friday, May 8th, on "The Prospects of the Bar in War Time and Afterwards."

HON. ROBERT T. BUSHNELL

Attorney General of Massachusetts

Formerly District Attorney of Middlesex County. A vigorous public servant at a critical period in the history of the Commonwealth. He will discuss the "Powers of the State Government in War Time," on Saturday, May 9th.

HON. JOHN V. SPALDING

Recently appointed an associate justice of the Superior Court, formerly an assistant United States Attorney and a lawyer of varied experience, teacher of Evidence at Northeastern Law School, and a member of the Judicial Council. As chairman of the special Committee on the proposed "Code of Evidence," he will open the discussion on Saturday, May 9th. The report of his committee is printed in this issue.

PROF. EDMUND M. MORGAN

Formerly an active trial lawyer in Minnesota, later a professor at the Yale Law School and now Acting Dean of the Harvard Law School, reporter of the "Code" for the American Law Institute, and, next to Wigmore, one of the leading authorities on "Evidence." He will take part in the discussion on Saturday, May 9th.

HON. EDMUND J. BRANDON

United States Attorney for the District of Massachusetts. Another vigorous public servant in a critical period. He will tell us about "Federal War Time Statutes and Their Effect," on Saturday, May 9th.

WALTER POWERS

An outstanding practitioner, member of the Board of Bar Examiners, who will preside at the discussion sessions on May 8th and 9th.

SPEAKERS AT THE BANQUET ON MAY 9TH

PHILIP A. HENDRICK, *Chairman and Toastmaster*

MAYO A. SHATTUCK

President of the Massachusetts Bar Association, who conceived the plan of the Institute and drafted Hendrick as Chairman.

HIS EXCELLENCY, LEVERETT SALTONSTALL

Governor of Massachusetts

who carries the responsibility for the wise exercise of the broadest powers that any Governor of the Commonwealth ever had.

HON. FRED TARBELL FIELD

Chief Justice of the Supreme Judicial Court

who when first appointed to the Court as an associate justice, in 1929, said, at a bar dinner, "I regard service on the court as a great intellectual adventure."

HON. JOHN J. PARKER
Charlotte, N.C.

The principal speaker of the evening

Judge Parker was born in North Carolina in 1885. Admitted to the bar in 1908, he practised in his native state until October 3, 1925, when he was appointed by President Coolidge, a judge of the United States Circuit Court of Appeals for the Fourth Judicial Circuit. During the administration of President Hoover, he was appointed to the Supreme Court of the United States but was refused confirmation by the Senate. Taking his defeat with a smile, in the spirit of American sportsmanship, he took the initiative as a leader in the development of the annual circuit conferences of the bench and bar in the Fourth Circuit, a professional movement which spread over the country in the early thirties and helped to prepare the bar to render nation-wide service in the consideration of Federal rules under the acts of Congress restoring the rule-making function to the Federal Courts. When that was done, in 1938, Judge Parker accepted the chairmanship of the section on the Administration of Justice of the American Bar Association and has travelled all over the United States in the effort to stimulate the profession to meet its public responsibilities in this period of transition. Few men have rendered greater professional service with so wide an influence.

Massachusetts Lawyers' Institute

NEW OCEAN HOUSE, SWAMPSCOTT

MAY 8 AND MAY 9, 1942

Program of the Institute

ALL MASSACHUSETTS LAWYERS ARE INVITED

Make Reservations with
PHILIP A. HENDRICK, CHAIRMAN
111 DEVONSHIRE STREET, BOSTON

Rates at the New Ocean House for the Institute

For double room (twin beds) with bath $7, $7.50 and $8 per person per day, *including three meals.* Rates vary according to the location of the room. Banquet tickets will be $5.00. *Guests of the hotel will receive a partial credit on the hotel bills if they attend the banquet.*

Program

FRIDAY, MAY 8

12.30–2.00 p.m.	Registration and luncheon.
2.15–4.00	Walter Powers, Presiding. "Family and Probate Law and Procedure." Open panel discussion conducted by a committee headed by Guy Newhall. The discussion will include fiduciary accounting and the guardian *ad litem* problem.
4.00	"Prospects for the Bar in Wartime and Afterward" by Honorable Hugh D. McLellan, former Judge of the United States District Court.
5.00	Cocktail hour.
6.30	Dinner hour.
8.15	The Harvard Glee Club and Miriam Hendrick Cahalin, reader.
10.00	Dancing.

SATURDAY, MAY 9

Walter Powers, Presiding.

10.00 a.m. Remarks by Mayo A. Shattuck, President of the Massachusetts Bar Association.

10.30 "Powers of the State Government in Wartime" by Honorable Robert T. Bushnell, Attorney General of the Commonwealth of Massachusetts.

11.30 "American Law Institute Code of Evidence." Open panel discussion conducted by a committee headed by Honorable John V. Spalding.

1.00 p.m. Luncheon.

2.00 Annual Meeting of the Massachusetts Bar Association.
Report of the President and Treasurer and election of officers.

3.00 "Federal Wartime Statutes and Their Effect" by Honorable Edmund J. Brandon, United States Attorney for the District of Massachusetts.

4.00 Committee Meetings:

1. Committee to prepare for celebration of the 250th anniversary of the founding of the Supreme Judicial Court. Damon E. Hall, Chairman.
2. Committee on New Legislation. Willard B. Luther, Chairman.
3. Committee on Public Relations. John E. Peakes, Chairman.
4. Committee on Membership. Nathan P. Avery and Edwin P. Dunphy, Co-Chairmen.
5. Committee to study and report upon the Model Youth Correction Act (American Law Institute). Arthur W. Blakemore, Chairman.
6. Committee on Grievances. Lispenard B. Phister, Chairman.
7. Committee on Administrative Law. Faneuil Adams, Chairman.

5.30 Cocktail hour.

7.00 BANQUET. Philip A. Hendrick, Chairman and Toastmaster.

Remarks of Welcome. Mayo A. Shattuck, President of Massachusetts Bar Association.

Brief remarks by Governor Leverett Saltonstall.

Brief remarks by Honorable Fred T. Field, Chief Justice of the Supreme Judicial Court.

Address "Improving the Administration of Justice" by Honorable John J. Parker of Charlotte, N.C., Judge of the United States Circuit Court of Appeals, Fourth Judicial Circuit.

MASSACHUSETTS BAR ASSOCIATION.

NOTICE OF ANNUAL MEETING

The annual meeting of the Massachusetts Bar Association for the election of officers, consideration of the reports of committees and such other business as may come before the meeting, will be held at the New Ocean House, Swampscott, on Saturday, May 9, 1942 at 2 P.M.

FRANK W. GRINNELL, *Secretary.*

REPORT OF THE NOMINATING COMMITTEE

The Nominating Committee of the Massachusetts Bar Association herewith submits its nominations for officers of the Association for the ensuing year:

President

Mayo A. Shattuck, Hingham

Vice-Presidents

Hon. Franklin T. Hammond, Cambridge
Harold S. R. Buffinton, Fall River
Edwin P. Dunphy, Northampton
Guy Newhall, Lynn
Charles T. Tatman, Worcester

Secretary

Frank W. Grinnell, Boston

Treasurer

Horace E. Allen, Springfield

Members-at-Large of the Executive Committee

Richard S. Woodbury, Springfield
Lispenard B. Phister, Boston
John E. Peakes, Newton
John E. Hannigan, Boston
Morris R. Brownell, New Bedford
W. Arthur Garrity, Worcester
Charles P. Ryan, Fall River

Respectfully submitted,

Owen A. Hoban, Gardner
James J. Kerwin, Lowell
William A. O'Hearn, Adams
Arthur E. Seagrave, Fall River
Elias Field, Boston, *Chairman.*

Note

Under the by-laws other nominations may be sent to the Secretary in writing before the meeting.

The President, the last ex-President, the Treasurer and the Secretary are members of the Executive Committee *ex officio*.

Under the by-laws the presidents of the following fourteen *affiliated* associations, or a delegate of each of such associations designated by them, are members *ex officio* of the Executive Committee of the Massachusetts Bar Association:

Barnstable County Bar Association
Berkshire County Bar Association
Bar Association of the City of Boston
Bristol County Bar Association
Essex Bar Association
Franklin County Bar Association
Hampden County Bar Association
Hampshire County Bar Association
Law Society of Massachusetts
Massachusetts Conveyancers' Association
Bar Association of the County of Middlesex
Norfolk County Bar Association
Plymouth County Bar Association
Worcester County Bar Association

COMMITTEE ON PUBLIC RELATIONS

John E. Peakes, Newton, Chairman

Richard Bancroft, Cambridge, Secretary

Sumner H. Babcock, Wellesley
Raymond C. Baldes, Boston
Richard C. Curtis, Boston
Edwin P. Dunphy, Northampton
William E. Fuller, Fall River
W. Arthur Garrity, Worcester
Robert W. Hill, Salem
Charles A. Rome, Newton
James M. Rosenthal, Pittsfield
Arthur J. Santry, Brookline
James W. Sullivan, Lynn
Joseph Wiggin, Malden

COMMITTEE ON ADMINISTRATIVE LAW

Faneuil Adams, Cambridge, Chairman

Israel Brayton, Fall River
Raymond P. Baldwin, Boston
Martin F. Connolly, Amesbury
Mrs. Eunice B. Topliffe, Needham
Frank H. Wright, Great Barrington

COMMITTEE TO CONSIDER THE YOUTH AUTHORITY CORRECTION ACT OF THE AMERICAN LAW INSTITUTE

Arthur W. Blakemore, Newton, Chairman

Robert W. Bodfish, Springfield
Eleanor S. Burr, Cambridge
Sturtevant Burr, Brookline
Joseph W. Keith, Brockton
Daniel W. Lincoln, Worcester
John F. Noxon, Pittsfield
Arthur E. Seagrave, Fall River

GRIEVANCE COMMITTEE — (*Address 5 Park St., Boston*)

Lispenard B. Phister, Newbury, Chairman

William A. O'Hearn, North Adams
George L. Sisson, Fall River
William F. Hayes, Ipswich
Joseph T. Bartlett, Greenfield
Robert W. Bodfish, Springfield
Merrill E. Torrey, Northampton
S. Osborn Ball, Provincetown
Arthur L. Eno, Lowell
Charles Barton, Worcester
Eugene G. Kraetzer, Jr., Concord
Gardner W. Russell, Wellesley
Daniel L. O'Donnell, Weymouth
A. Rodman Hussey, Jr., Plymouth
Theodore P. Hollis, Stoneham
Brooks Potter, Newton
Miss Ines DiPersio, Boston
Harold Horvitz, Newton
Bert E. Holland, Boston

REPORT OF COMMITTEE OF MASSACHUSETTS BAR ASSOCIATION ON PROPOSED CODE OF EVIDENCE OF AMERICAN LAW INSTITUTE

(This "Code" like the Institute's "Code of Criminal Procedure" is prepared as an advisory code for consideration in whole or in part, in any jurisdiction. Prof. Morgan's Articles on the Code appeared in the A. B. A. Journal for September, October, December, 1941. Prof. Wigmore's Dissent appeared in the same Journal for January, 1942. — ED.)

Mayo A. Shattuck, president of the Massachusetts Bar Association, pursuant to a request of the American Law Institute, has asked that a committee of the association be formed for the purpose of studying the Institute's Tentative Draft No. 2 of the Code of Evidence and make such suggestions and comments as the committee deemed advisable. A committee was formed comprising the following members of the Massachusetts bar:

John V. Spalding, Chairman, Richard B. Walsh, Edward M. Dangel, Gerald J. Callahan, Lafayette R. Chamberlin, Robert M. Hopkins, Wilfred H. Smart, Neil Leonard, Edward B. Hanify, Edwin G. Norman, Charles W. Bartlett, Richard Wait and Theodore Chase.

After the committee was organized, sub-committees were appointed so that the Code could be studied more intensively. The sub-committees met frequently and several meetings of the entire committee were held.

In submitting its comments the committee does not at this time want to record itself on the general question of the desirability of the Code. It seemed to the committee, since this was a tentative draft, that it could be of more help in pointing out certain portions of the Code which seemed desirable or objectionable, and in some cases, suggestions for improvement in the form or language.

The committee, composed at it was, of a group of busy practising lawyers, lacked both the time and the information for anything approaching an exhaustive analysis of the Code.

The committee, therefore, has confined itself largely to those matters which were of interest to them as practising lawyers and even as to those it has touched on only some of the high spots.

COMMENTS OF THE COMMITTEE

Chapter I

RULE 1. Paragraphs (1) and (6) [of the "Tentative" Draft No. 2] contemplated that the rules are to be applicable to administrative proceedings unless they are to be enacted by rules of court, in which case they are not to apply. As between adopting the rules by legislation or by rules of court a majority of the committee favors the latter method. (See article by Frank Grinnell in 24 Journal of American Judicature Society on this subject.) Moreover, even if the rules are to be adopted by the

legislature the desirability of applying them to administrative proceedings is debatable. Liberal as the rules are as compared with those they supersede it may well be doubted if they are suitable for the almost infinite variety of administrative fact finding tribunals which exist today. (See the interesting article on this subject in 55 Harvard Law Review 364 (Jan. 1942) entitled "An Approach to Problems of Evidence in the Administrative Process" by Davis.)

Note

Since this report was prepared, the proposed "Final Draft" of the Code omits reference to "administrative proceedings" in paragraphs (1) and (6).

The following Rules are numbered as in the "Final Draft" dated March 16, 1942 to be submitted to the American Law Institute on May 12, 1942:

Rule 3. (2nd Draft p. 17.) ***Applicability of Rules to Undisputed Matter.***

If the judge makes a formal finding that there is no *bona fide* dispute between the parties as to a material matter, all evidence relevant thereto shall be admissible, subject to any valid claim of privilege though it would otherwise be inadmissible under these Rules.

We think that the word "shall" should be changed to "may in the discretion of the judge." Otherwise there is danger that the judge's hands would be tied to prevent counsel from padding the record unnecessarily.

Rule 5. (2nd Draft p. 18.) ***Exceptions Unnecessary.***

Formal exception to a ruling or order of the judge as to any matter to which these Rules are applicable is unnecessary; for all purposes for which an exception has heretofore been necessary, it is sufficient that a party, at the time when the ruling or order is made or sought, make known to the judge the action which he desires the judge to take or his objection to the action of the judge, and the grounds therefor.

Several members of the committee are not in favor of this rule. They think that the system, now obtaining, in Massachusetts, whereby counsel object and then except, if it is overruled, serves a useful purpose in indicating those objections that counsel insist upon and intend to use as a basis for an appeal. It not infrequently happens that counsel objects but after a discussion with the court and opposing counsel decides not to press the objection. It is conceivable that the present rule might operate as a trap for the trial judge. Since this rule is the same as Rule 46 of the Federal Rules of Civil Procedure it might be well to study how that has worked in this respect.

Rule 8. (2nd Draft p. 21.) ***Comment by Judge.***

After the close of the evidence and arguments of counsel the judge may sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses, if he instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses, and are not bound by the judge's comment thereon.

On this highly controversial subject, namely, the right of the trial judge to charge on the facts, the committee was evenly divided. It may well be that legislation which took away that power from the courts is an unconstitutional limitation of the judicial power by the legislature. This appears still to be an open question in Massachusetts. See *Langan* v. *Pianowski,* 307 Mass. 149, 152.*

Rule 101. (2nd Draft p. 30.) ***Qualification of Witnesses.***

Every person is qualified to be a witness as to any material matter unless the judge finds that

(a) the proposed witness is incapable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or

(b) the proposed witness is incapable of understanding the duty of a witness to tell the truth.

The committee highly approves of this rule. It is in substance the same as G. L. c. 233, Sec. 20 which has been on the Massachusetts statute books for nearly one hundred years. When the common law disqualifications were removed in Massachusetts in 1856 they were abolished in their entirety. We did not keep any disqualifications with respect to persons suing the estate of a deceased person and we are not aware that there has ever been any demand for such a rule. We do, however, in such cases give to the estate certain additional privileges with respect to introducing hearsay and other evidence. In view of the difficulty, sometimes, in defending suits against an estate this might be worth considering. We refer to G. L. c. 233, Sec. 66 which provides:

> "If a cause of action brought against an executor or administrator is supported by oral testimony of a promise or statement made by the testator or intestate of the defendant, evidence of statements, written or oral, made by the decedent, memoranda and entries written by him and evidence of his acts and habits of dealing tending to disprove or to show the improbability of the making of such promise or statement, shall be admissible."

Perhaps in view of other provisions in the Code this would not be necessary.

* For the legislative history of Gen. Butler's statute of 1860 (now G. L., C. 231, § 81) see 1 MASS. LAW QUARTERLY, 76–78, and for Gen. Butler's own account of it, see 11 MASS. LAW QUARTERLY, No. 2, 57–59 (Jan. 1923). For the nature of common law jury trial protected by American Constitutions, *see Quercia* v. *U S.*, 289 Mass. 466. As to the interpretation of the Massachusetts statute, see *Com* v. *Green,* 302 Mass. at p. 556. — EDITOR.

Rule 103. (2nd Draft p. 38.) ***Oath.***

Every witness before testifying shall be required to express his purpose to testify only to the truth, by oath or, at the option of the witness or the judge, by any other method, including affirmation, which the judge finds to be binding upon the conscience of the witness.

We have no objection to this rule but it ought to be clear that in those cases in which the judge uses some other method of binding the conscience of the witness than by oath or affirmation the witness should be subject to prosecution for perjury. Perjury statutes frequently refer to false testimony where "oath or affirmation" is required. (See Mass. G. L. c. 268, Sec. 1.) We would suggest adding after the word "witness" in line 4 the following: "and which will subject him to the legal penalties for false testimony including those for perjury." We use the words "including those for perjury" because we also have in mind the power of the court to find a witness in contempt. See *Blankenburg* v. *Commonwealth*, 272 Mass. 25.

Rule 105. (2nd Draft pp. 40–41.) ***Control of Judge Over Presentation of Evidence.***

The judge controls the conduct of the trial to the end that the evidence shall be presented honestly, expeditiously and in such form as to be readily understood, and in his discretion determines, among other things, . . .

(j) whether a witness in communicating admissible evidence may use as a substitute for oral testimony or in addition to it a writing, model, device or any other understandable means of communication, and whether a means so used may be admitted in evidence;

Rule 105 (j). This, in our opinion, is one of many instances where too much discretion is given the trial judge. It is true that whether the witness may illustrate his testimony with a chalk or model is and should be discretionary with the trial judge. But this rule goes farther and permits the trial judge to admit or not as he pleases plans, pictures or moving pictures which, if properly verified, are admissible now as a matter of right. Thus under illustration 10 if the trial judge finds that the talking motion picture of the confession is properly verified and otherwise admissible why should he have the discretionary right to exclude it? This rule changes the existing law as we understand it. See Wigmore 3rd Ed. Sec. 702. A trial judge should not possess any greater right to exclude, at his discretion, evidence of this kind that he would have to exclude the testimony of a witness, if otherwise admissible.

Rule 106. (2nd Draft pp. 53–4.) ***Evidence Affecting Credibility.***

(1) Subject to Paragraphs (2) and (3), for the purpose of impairing or supporting the credibility of a witness, any

party including the party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issue of his credibility as a witness, and need not, in examining him as to a statement made by him in writing inconsistent with any part of his testimony, show or read to him any part of the writing, except that extrinsic evidence shall be inadmissible

(a) of traits of his character other than honesty or veracity, or

(b) of his conviction of crime not involving dishonesty or false statement, or

(c) of specific instances of his conduct relevant only as tending to prove a trait of his character.

(2) The judge in his discretion may exclude extrinsic evidence of a written or oral statement of the witness offered under Paragraph (1) unless the witness was so examined while testifying as to give him an opportunity to deny or explain the statement.

(3) For the purpose of impairing the credibility of an accused in a criminal action who testifies at a trial therein the accused shall not at that trial be examined, nor shall any evidence be admitted, as to facts tending to prove his commission or conviction of another crime, unless he has first introduced evidence of his good character to support his credibility.

RULE 106. This rule abolishes the time-honored rule that one cannot impeach one's own witness, and we are in favor of it. The reasons behind the common law rule were of doubtful validity. A person frequently has little choice as to whom his witnesses will be; he takes them as he finds them. The common law rule unduly hampered the party calling a witness.

We are in some doubt as to whether impeaching a witness by showing a conviction ought to be limited to crimes involving honesty or false statement. Would it not be better to provide for crimes of the felony class with a limitation that after ten years it could not be shown unless he had been convicted of a like crime within ten years from the time of testifying? See G. L. c. 233, Sec. 21.

We suggest the word "conviction" as used in this rule should be defined by adding the following paragraph:

> "(4) The word conviction as used in this rule shall mean any case in which after a plea or finding of guilty the case has been disposed of by filing, probation, suspended sentence, by fine or imprisonment."

This avoids questions as to what constitutes a conviction and permits a record to be used, where as frequently happens, the defendant is given probation or a suspended sentence. See *City of Boston* v. *Santosuosso,* 307 Mass. 302, 330–331.

The provision in paragraph (3) that a conviction may not be introduced to impeach the credibility of a criminal defendant unless he introduces evidence of his good character has considerable merit, but we think it should be kept in the Code only if the provision as to comment in Rule 201 (3) is kept. The two seem to be inextricably linked together.

Rule 201. (2nd Draft p. 65.) ***Privilege of Accused.***

(1) Every person has a privilege not to be called as a witness and not to testify in any criminal action in which he is an accused.

(2) An accused in a criminal action has no privilege to refuse to submit his body to examination by the judge or trier of fact or to refuse to do any act in their presence other than to testify.

(3) If an accused in a criminal action does not testify, the judge and counsel may comment upon accused's failure to testify, and the jury may draw all reasonable inferences therefrom.

CHAPTER III

RULE 201 (3). This raises some very controversial questions not only of policy but of constitutional law. Inasmuch as this deals with a privilege found in the bill of rights of most of our constitutions it is quite possible that a constitutional amendment would be required. Certainly, in view of Opinion of the Justices, 300 Mass. 620, such an amendment would be required in Massachusetts. Furthermore it would amount to a nullification of the privilege. To grant a privilege in one section of the rule and virtually to nullify it in another, as we think the power to comment does, makes the privilege illusory and of doubtful value.

Rule 208. (2nd Draft p. 74.) ***Self-Incrimination; Waiver by Accused.***

A defendant in a criminal action who voluntarily testifies in the action upon the merits before the trier of fact has no privilege under Rule 203 to refuse to disclose any matter relevant to any issue in the action other than the issue of his credibility as a witness.

We agree with this rule but see no reason for the qualifying words ["other than the issue of his credibility as a witness"]. Why should not a defendant when he takes the stand not be examined as "to whatsoever has a legitimate bearing on the question of his guilt" to use the words of the Massachusetts court in *Commonwealth* v. *Smith,* 163 Mass. 411, 431–433.

The decisions of the Supreme Court of the United States seem also to point that way. See *Raffel* v. *U. S.,* 271 U. S. 494.

Whether or not the defendant is telling the truth would seem to have a direct bearing on his guilt and we see no reason for retaining the privilege as to those matters.

Rule 210. (2nd Draft p. 78.) ***Communication between Client and Lawyer.***

Subject to Rules 211, 212, 213 and 227, a person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing, a communication if he claims the privilege and the judge finds that

(a) the communication was a confidential communication between client and lawyers, and

(b) the client or lawyer reasonably believed the communication to be relevant to an offer or acceptance or rejection of a retainer of the lawyer by the client or to the seeking or rendering of the lawyer's legal service in his professional capacity, and

(c) the witness

(i) is the holder of the privilege, or

(ii) at the time of the communication was the lawyer or a representative of the client or of the lawyer in transmitting the communication or a person to whom disclosure was made because reasonably necessary for the transmission or the accomplishment of the purpose for which it was transmitted, or

(iii) is any other person who obtained knowledge or possession of the communication as a result of an intentional breach of the lawyer's duty of non-disclosure by the lawyer or his agent or servant, and

(d) the claimant is the holder of the privilege, or a person authorized to claim the privilege for the holder.

RULE 210. The syntax of this rule is, in the language of Dean Wigmore, one for considerable "mental exercitation." It is a little difficult to know exactly what situations the rule covers, but one would gather from subparagraph (d) that a lawyer cannot claim a privilege as to a communication made to him by a *former* client, who is not present in person or represented by counsel. It would seem that the privilege should exist and be capable of exercise in such a situation. Does the client have a privilege as to communications which are relevant in an action between lawyer and client? If a lawyer sues a former client for his fee, the nature of the problem presented to the lawyer and the advice which the lawyer has given to his client may be material on the issue as to the value of the services rendered. It would seem unfair in this situation to permit the client to claim a privilege. However, this situation does not seem to be covered by the rule, though Rule 216 (b) takes care of an analogous situation in dealing with the marital privilege. Some limitation dealing with the situation might well be added to Rule 213.

Rule 215. (2nd Draft p. 83.) ***Marital Privilege; Confidential Communications between Spouses.***

Subject to Rules 216, 217, 218 and 227, a person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that

(a) the communication was a confidential communication between spouses, and

(b) the witness was at the time of the communication one of the spouses or is the duly appointed, qualified and acting guardian of his person, and

(c) the claimant is the holder of the privilege, or a person authorized to claim the privilege for him.

Rule 216. (2nd Draft p. 86.) ***Marital Privilege; Limitations.***

Neither of the spouses has a privilege under Rule 215 in

(a) an action by one of them for divorce or separation from the other, or for damages for the alienation of the affections of the other, or for criminal conversation with the other, or

(b) an action for damages for injuries done by one of them to the person or property of the other, including an action for wrongful death of the other, or

(c) a criminal action in which one of them is charged with

(i) a crime against the person or property of the other or of a child of either, or

(ii) a crime against the person or property of a third person committed in the course of committing a crime against the other, or

(iii) bigamy or adultery, or

(iv) desertion of the other or of a child of either, or

(d) a criminal action in which the accused offers evidence of a communication between him and his spouse.

RULES 215, 216. Should not the privilege be further limited so as not to apply in proceedings to annul a marriage? Of course if there is an annulment there was never a valid marriage, but that result is not known until the case is decided. Prior to that time it would seem that the marriage was voidable and not void and the communications might be held to be privileged. See Note in 43 Harvard Law Review 109.

It might also be advisable to include specifically in 216 (c) (i) criminal non-support proceedings. See Mass. G. L. c. 233, Sec. 20.

Rule 229. (2nd Draft p. 92.) ***Comment and Inference as to Allowance of Privilege.***

If a privilege to refuse to disclose, or a privilege to prevent another from disclosing, a matter is claimed and allowed, the judge and counsel may comment thereon, and the jury may draw all reasonable inferences therefrom.

This raises a question on which the authorities are by no means uniform. Indeed in one jurisdiction, namely, Massachusetts, the decisions seem to be inconsistent. See *Phillips* v. *Chase,* 201 Mass. 444, *Andrews* v. *Frye,* 104 Mass. 234, 236, Opinion of the Justices, 300 Mass. 620 and *Leave* v. *Boston Elevated Ry.,* 306 Mass. 391. Again we repeat what we said with respect to comment on the exercise of the self-incrimination privilege, it seems paradoxical to speak of comment on the exercise of a privilege. If a party is thus penalized because he invokes a privilege it is a right of very dubious value. If a party keeps out evidence by invoking a rule of evidence, for example, the hearsay rule, we do not understand that this can be the subject of comment. *Minihan* v. *Boston Elevated Ry.,* 197 Mass. 367. He is merely invoking a rule of law, which is his right and privilege and he should not be at a disadvantage for so doing. See Wigmore 3rd Ed. Sec. 286.

Furthermore, if the considerations impelling the judge to allow or refuse to allow comment on a claim of privilege are revealed to him on the "voir dire" hearing as the illustrations suggest it is difficult to contemplate just what "reasonable inference" the jury may draw from the claim of privilege if the considerations are not available to them.

Rule 230. (2nd Draft p. 94.) ***Effect of Error in Overruling Claim of Privilege.***

A party may predicate error on a ruling disallowing a claim of privilege only if the privilege is his own.

This rule, like the rule allowing comment, renders the privilege less valuable. The court, realizing that allowance of a claim of privilege is reviewable while disallowance of the claim is not, may very well be inclined to disallow such claims as a matter of course. The contrary view in Massachusetts is based on the theory that if a claim of privilege is improperly disallowed, then the verdict will rest upon illegal evidence, hence error may be predicated. *Commonwealth* v. *Kimball,* 24 Pick. 366, 369. It must be recognized, even by the commentators (see p. 80), that the Massachusetts rule provides "the only practical way of revising the trial court's decision." *Commonwealth* v. *Shaw,* 4 Cush. 594, 596.

Furthermore, the rule as it stands does not seem even theoretically sound. It is based on the proposition that a privilege is personal to the witness. Yet it allows a party to predicate error in the proceedings if his own claim of privilege as a witness is disallowed. See Wigmore, sec. 2270.

Rule 301. (2nd Draft p. 100.) ***Testimony of Juror.***

Whenever any act, event or condition known to a member of a petit or grand jury is a subject of lawful inquiry, any witness, including every member of the jury, may testify to any material matter including any statement or conduct or condition of any member of the jury, whether the matter occurred or existed in the jury room or elsewhere, and whether during the deliberations of the jury, or in reaching or reporting its verdict or finding, or in any other cicumstances, except that upon an issue as to the validity of a verdict or indictment no evidence shall be received concerning the effect which anything had upon the mind of a juror as tending to cause him to assent to or dissent from the verdict or indictment or concerning the mental processes by which it was reached.

We think this rule could be expressed with more brevity and clearness. It seems to us that after the word "matter" in line 10, the phrase beginning with "including" and ending with the word "circumstances" should be stricken out.

Rule 302. (2nd Draft p. 102.) ***Testimony by Judge or Juror.***

The judge or a petit juror in an action may be a witness therein. If the judge testifies concerning a disputed material matter, he shall not continue as judge in the action against the objection of a party not calling him; if a juror testifies concerning such a matter, he shall continue as a juror therein unless the judge finds that to allow him to do so is likely to prevent a fair consideration by the jury of an issue in the action.

RULE 402. This rule should be changed so that neither the judge nor the juror, once he has testified, should continue to act. Counsel should not be placed in the position of objecting to the continuance of a judge. Furthermore, the appearance of impartiality is often quite as important as actual impartiality.

NOTE

(Does not this comment mean a new trial unless there is a waiver of a full jury, or of trial before the same judge? — ED.)

B. EVIDENCE OF COMPARATIVELY SLIGHT PROBATIVE VALUE.

Rule 303. (2nd Draft p. 105.) ***Discretion of Judge to Exclude Admissible Evidence.***

(1) The judge may in his discretion exclude evidence if he finds that its probative value is outweighed by the risk that its admission will

(a) necessitate undue consumption of time, or

(b) create substantial danger of undue prejudice or of confusing the issues, or of misleading the jury, or

(c) unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered.

(2) All Rules stating evidence to be admissible are subject to this Rule unless the contrary is expressly stated.

RULE 403 gives too much discretion to the judge. If only one judge were to decide all cases, or if judges of uniform ability and tendencies passed on all such questions, it would remove the objection of inequality. So much depends on the personal tastes, tendencies and prejudices of the different judges that more harm would come than good. Some progress could be made in achieving the particular end sought by more precise court rules.

F. COMPROMISES.

Rule 309. (2nd Draft p. 116.) ***Offer to Compromise and the Like.***

(1) Subject to Paragraphs (3) and (4) hereof, evidence that a person has paid or furnished money or any other thing or has offered or promised to do so on account of any loss or damage of any kind sustained or claimed to have been sustained, whether or not in compromise of a claim, is inadmissible as probative of any matter tending to establish his civil liability for the loss or damage or any part of it.

(2) Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing in satisfaction of a claim is inadmissible as tending to establish the invalidity of the claim or of any part of it.

(3) Evidence that a person has partially satisfied an asserted claim of another on demand of the other without questioning the validity of the claim is admissible as tending to prove the validity of the claim.

(4) Evidence of a debtor's promise to pay all or part of his preexisting debt is admissible as tending to prove the creation of a new duty on his part, or a revival of his preexisting duty, to pay all or part of the debt.

It seems to us that this might be placed under Chapter VI which deals with admissions, for we think that this is generally known and discussed under this heading.

We suggest that the word "party" be substituted for "person" for, as we understand the doctrine, it applies only to an offer made by a party. See *Huntley* v. *Snider,* 86 F. (2d) 539 (C. C. A. 1).

Rule 401. (2nd Draft p. 121.) ***Testimony in Terms of Opinion.***

(1) In testifying to what he has perceived a witness, whether or not an expert, may give his testimony in terms

which include inferences and may state all relevant inferences, whether or not embracing ultimate issues to be decided by the trier of fact, unless the judge finds:

(a) that to draw such inferences requires a special knowledge, skill, experience, or training which the witness does not possess, or

(b) that the witness can readily and with equal accuracy and adequacy communicate what he has perceived to the trier of fact without testifying in terms of inference or stating inferences, and his use of inferences in testifying will be likely to mislead the trier of fact to the prejudice of the objecting party.

(2) The judge may require that a witness, before testifying in terms of inference, be first examined concerning the data upon which the inference is founded.

[*This rule has been somewhat revised since the 2nd Draft*]

We think that on the whole, this is a desirable change in the law and eliminates needless quibbles as to whether a non-expert witness is testifying as to a fact or a conclusion or is usurping the function of the jury. The right to cross-examine ought to be sufficient protection to the opposing party.

Rule 403. (2nd Draft p. 123.) ***Appointment of Experts.***

In an action in which the judge determines that expert evidence will be of substantial assistance, he may, of his own motion or at the request of a party, at any time during the pendency of the action

(a) order the parties

(i) to show cause why expert witnesses should not be appointed to give evidence in the action, and

(ii) to submit nominations for their appointment, and objections to proposed appointments, and

(b) appoint one or more expert witnesses of his own selection to give evidence in the action except that, if the parties agree as to the experts to be appointed, he shall appoint only those designated in the agreement.

This is a very radical departure from the existing law and we seriously question the advisability of it. Some members of the committee are strongly opposed to it.

Rule 404. (2nd Draft p. 125.) ***Testimony by Other Experts.***

Subject to Rule 105 (c), a party may call an expert witness who has not been appointed under Rule 403, if the judge finds that

(a) the party has given reasonable notice to each adverse party of the name and address of the witness to be called, or

(b) it is expedient, notwithstanding a failure to give such notice, to permit the witness to be called.

This is distinctly objectionable because it leaves too much power to the presiding judge in determining whether other expert witnesses may be called. They should be called as a matter of right. In this rule, the use of the word "expedient" is regrettable as meaning nothing, or everything, as the case may be.

Rule 405 (2nd Draft p. 126.) ***Examination and Report by Experts.***

[*This rule supplements Rule 401 by providing that the judge on his own motion or that of a party after notice and hearing may order that a party submit "his person and all persons, things and places under his control insofar as the judge deems necessary," etc., and the expert, or experts, file a report in court.*]

Rule 406. (2nd Draft p. 129.) ***Reports Open to Inspection.***

Each report filed pursuant to Rule 405 shall be open to inspection by each party to the action immediately after filing. No expert witness who made or joined in making a report shall be called as a witness until a reasonable time after the filing of the report.

There is no provision in these rules as to the stage of a trial at which experts may be appointed or called to testify. It is easy to conceive of a case where it will not appear that expert testimony is advisable until the case is actually on trial and perhaps the trial nearly finished. It seems to us that some provision should be made in the rules so that a trial cannot be concluded until the evidence to be given by experts can be produced. We are in doubt whether an entirely new rule covering this point should be added. Perhaps Rule 506 could be amended to cover this. Accordingly we suggest that the last sentence in Rule 506, which now reads "no expert witness who made, or joined in making, a report shall be called as a witness until a reasonable time after filing the report" be amended to read as follows: "No expert witness who made, or joined in making a report shall be called as a witness, and no trial shall be concluded until a reasonable time after the filing of the report."

Rule 407. (2nd Draft p. 130.) ***Examination of Experts Appointed by Judge.***

An expert witness appointed by the judge may be called as a witness by the judge or by a party and may be examined by each party as if the witness had been called by an adverse party. The fact of the appointment by the judge shall be made known to the trier of fact.

The committee is opposed to this. It puts too much power in the trial judge and places undue emphasis on the fact that he has called the expert. It is possible that it opens the door for

the appointment of persons who stand well with the judge and who, as in the case of some guardians *ad litem*, have no other qualifications for their appointment.

Rule 409. (2nd Draft p. 131.) ***Opinion Without Previous Statement of Data.***

An expert witness may state his relevant inferences from matters perceived by him or from evidence introduced at the trial and seen or heard by him or from his special knowledge, skill, experience or training, whether or not any such inference embraces an ultimate issue to be decided by the trier of fact, and he may state his reasons for such inferences and need not, unless the judge so orders, first specify, as an hypothesis or otherwise, the data from which he draws them; but he may thereafter during his examination or cross-examination be required to specify those data.

This may well be an improvement over the existing law, but much would depend on how it was administered by the judge. It would virtually abolish the hypothetical question and one member of the committee believes that should be retained. A majority of the committee feel that the hypothetical question has been much abused, and in many instances serves to confuse rather than help the jury.

Rule 502. (2nd Draft p. 148.) ***Admissibility of Hearsay Evidence.***

Hearsay evidence is inadmissible except as stated in Rules 503 to 530.

Rule 503. (2nd Draft p. 148.) ***Admissibility of Evidence of Hearsay Declaration.***

Evidence of a hearsay declaration is admissible if the judge finds that the declarant

(a) is unavailable as a witness, or

(b) is present and subject to cross-examination.

RULE 503. This is a very radical extension of the Massachusetts hearsay statute (G. L. c. 233, sec. 65)* in that it allows in evidence statements of any unavailable witness. Under the Massachusetts statute death is the only form of unavailability recognized. That statute further provided the statement must be made before the commencement of suit, must be made in good faith and upon the personal knowledge of the declarant. It seems to us that "unavailability" as defined in Rule 1 (13) ought to provide that a witness is not unavailable unless due diligence has been used to obtain the deposition of the witness. Rule 603 as it now stands makes it altogether too easy for a person to use the testimony of an unavailable witness thereby depriving the op-

* The history of the Massachusetts statute admitting declarations of deceased persons appears in 8 MASS. LAW QUARTERLY No. 2, 67–68. For the latest recommendation of the Judicial Council on the subject see 16th Report (reprinted in 26 MASS. LAW QUARTERLY, Suppl. to Jan. 1941) 40–41 and see St. 1941, C. 363. — ED.

ponent of the very important right to cross-examine. Under this rule the admissibility of hearsay evidence becomes the rule, inadmissibility the exception. There is no guaranty as to the trustworthiness of the testimony. Necessity seems to be all that is required. We think it goes too far.

Another very serious objection to this rule is that if it applies to criminal cases, as it apparently does, serious constitutional questions would be involved. Many constitutions contain provisions similar to that found in the sixth amendment of the United States Constitution giving the defendant the right "to be confronted with the witnesses against him." (See also Article 12 of the Declaration of Rights in the Massachusetts Constitution.) The Supreme Court of the United States has shown no disposition to whittle away this right. See *Kirby* v. *U. S.*, 174 U. S. 47, *Dowdell* v. *U. S.*, 221 U. S. 325, 330.

The above mentioned Massachusetts statute has never been applied in criminal cases. See *Commonwealth* v. *Gallo*, 275 Mass. 320, 335. While we realize that this constitutional privilege ought not to stand in the way of all attempts to enlarge the exceptions to the hearsay rule (see *Commonwealth* v. *Slavski*, 245 Mass. 405), nevertheless this is such a radical extension that it ought to be very carefully considered. Furthermore, the advisability of submitting a Code for legislative enactment which, as we believe, would necessitate a constitutional amendment may well be doubted.

Rule 505. (2nd Draft p. 154.) ***Confessions.***

Evidence of a hearsay statement by an accused that he has done or omitted something the doing or omission of which constitutes a crime or an essential part of a crime is admissible against him in a criminal action if, but only if, the judge finds that

(a) the accused was not induced to make the statement by

(i) infliction of physical suffering upon him or threats thereof, or

(ii) threats or promises, likely to cause him to make such a statement falsely, which concerned action to be taken by a public official with reference to the crime and were made by a person whom the accused reasonably believed to have the power or authority to secure the execution of the threats or promises, and

(b) the accused when making the statement was conscious and was capable of understanding what he said and did.

We think the provision which excludes confessions only if threats or promises were likely to cause the defendant to make such statements falsely is a good provision as it probably would make impossible decisions such as *Bram* v. *U. S.*, 168 U. S. 532 and *Davis* v. *U. S.*, 32 F. (2d) 860 (C. C. A. 9) which, it seems

to us, give the accused far more protection than he is entitled to. Would it not be a good idea to provide that even if a confession were obtained by threats or promises which were likely to make the statement unreliable that the confession nevertheless could be used if other corroborating circumstances made it likely that the confession was reliable?

The present law with respect to confessions, which Rule 605 seems to adopt, in reality affords the defendant an illusory protection. Most confessions are obtained by police officers and not infrequently under circumstances which are not commendable. In theory the defendant has a right to keep out confessions if improperly obtained; in practice, however, it is generally his word against the police officer's and actually very few are excluded. Would it not be better to provide that a confession obtained after the arrest of the defendant either ought to be made to some magistrate or under some such system as that recommended by Wigmore, namely, the taking of a confession by a sound film? This would give the defendant a protection which he does not now have. The existing rule keeps out many confessions that ought to come in and lets in others that ought to be kept out.

We think that the abolition of the distinction between a confession and an admission under this rule (see *Commonwealth* v. *Haywood*, 247 Mass. 16) is sound. It seems to us that if there is any validity to the confession doctrine it ought to apply equally well to an admission.

Rule 509. (2nd Draft p. 168.) ***Declarations Against Interest.***

(1) A declaration is against the interest of a declarant if the judge finds that the matter declared was at the time of the declaration so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such a risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the declaration unless he believed it to be true.

(2) Subject to Rule 505, evidence of so much of a hearsay declaration is admissible as consists of a declaration against interest and such additional parts thereof, including matter incorporated by reference, as the judge finds to be so closely connected with the declaration against interest as to be equally trustworthy.

This is an improvement in the law and does away with decisions such as *Donnelly* v. *U. S.*, 228 U. S. 243, 273 and *Commonwealth* v. *Chin Kee*, 283 Mass. 248 which cling to the outmoded principle that a declaration to be against interest must be against one's proprietary interest as distinct from other interests equally, if not more, important.

Rule 511. (2nd Draft p. 173.) ***Prior Testimony or Deposition.***

Evidence of a hearsay statement which consists of testimony given by the declarant as a witness in an action or in a deposition taken according to law for use in an action is admissible for any purpose for which the testimony was admissible in the action in which the testimony was given or for use in which the deposition was taken, unless the judge finds that the declarant is available as a witness and in his discretion rejects the evidence.

This greatly extends the admissibility of testimony at a former trial. The prevailing rule with respect to testimony at a former trial requires the parties to be the same and the issues to be substantially the same. There is no requirement here with respect to identity of parties or of issues. It seems to us to be going pretty far to allow testimony at a former trial when the issues might have been totally different from those at the trial at which the testimony is offered. We submit that the rule ought to provide that there be a substantial similarity of issues.

Rule 514. (2nd Draft p. 181.) ***Business Entries and the Like.***

(1) A writing offered as a memorandum or record of an act, event or condition is admissible as tending to prove the occurrence of the act or event or the existence of the condition if the judge finds that it was made in the regular course of a business and that it was the regular course of that business for one with personal knowledge of such an act, event or condition to make such a memorandum or record or to transmit information thereof to be included in such a memorandum or record, and for the memorandum or record to be made at or about the time of the act, event or condition or within a reasonable time thereafter.

(2) Evidence of the absence of a memorandum or record of an asserted act, event or condition from the memoranda or records of a business is admissible as tending to prove the non-occurrence of the act or event or the non-existence of the condition in that business, if the judge finds that it was the regular course of that business to make such memoranda of all such acts, events, or conditions at the time thereof or within a reasonable time thereafter, and to preserve them.

(3) The word business as used in Paragraphs (1) and (2) includes every kind of occupation and regular organized activity, whether conducted for profit or not.

This rule is in all essential respects the same as Massachusetts G. L. c. 233, sec. 78.* The Massachusetts statute has been in

* The original book account statute of 19B (C. 288) was proposed by the Committee on Legislation of the Mass. Bar Association, see reports of that Committee for 1913, p. 32 and 1914, pp. 9–11, reprinted with letters from the late E. R. Thayer in 1 MASS. LAW QUARTERLY No. 4, 340–344 (August 1916). The statute was extended on recommendation of the Judicial Council (see 5th report, 1929, 21–23) by St. 1930, C. 87, now included in G. L., C. 233, § 78. — EDITOR.

operation for over ten years, and we think that on the whole it is a vast improvement over the pre-existing law with respect to proving business entries. The Massachusetts statute is limited to civil cases (see *Commonwealth* v. *Perry,* 248 Mass. 19). We see no reason why evidence of this sort should not be admissible in both criminal and civil cases. See U. S. Code, Title 28, Sec. 695 and see *Landay* v. *U. S.,* 108 F. (2d) 698.

Rule 521. (2nd Draft p. 189.) ***Judgments of Conviction.***

Evidence of a subsisting judgment adjudging a person guilty of a crime or misdemeanor is admissible as tending to prove the facts recited therein and every fact essential to sustain the judgment.

This changes the existing law, but we think on the whole that it is a change for the better. The conventional rule, and that prevailing in Massachusetts, is to the effect that a judgment in a criminal case is not admissible against the defendant when that issue arises in a civil proceeding. See *Commonwealth* v. *Lincoln,* 110 Mass. 410, *Minasian* v. *Ætna Life Ins. Co.,* 295 Mass. 1. The rule in some jurisdictions seems to make it admissible as evidence although not conclusive (see *Schindler* v. *Royal Insurance Company,* 258 N.Y. 310) and that is what this rule purports to do. It has always seemed somewhat strange where a defendant was prosecuted for defrauding an insurance company by setting his house on fire that the conviction adjudging him guilty should not at least have some evidential value in a suit brought against the insurance company on the insurance policy.

Rule 526. (2nd Draft p. 199.) ***Reputation as to Character.***

Whenever a trait of a person's character at a specified time is a material matter, evidence of his reputation with reference thereto at a relevant time in the community in which he then resided or in a group with whom he then habitually associated in his work or business or otherwise is admissible as tending to prove the truth of the matter reputed.

We think this is an improvement over the existing law. The present rule that only persons who live in the community are qualified to testify on the matter of character has long outlived its usefulness. A man may live in an apartment house where he is known by nobody and yet be well-known to his business colleagues; a business associate should be able to testify as to his good reputation fully as much as people who scarcely know him at all and yet under the law as it now stands this cannot be done. See *Stock* v. *Dellapenna,* 217 Mass. 503.

Rule 528. (2nd Draft p. 201.) ***Commercial Lists and the Like.***

Evidence of statements of matters of interest to persons engaged in an occupation contained in a list, register, periodical, or other published compilation is admissible as tending to prove the truth of any relevant matter so stated if the

judge finds that the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them therein.

This seems to adopt the prevailing rule. *Virginia* v. *West Virginia*, 238 U. S. 202, 212. It would apparently change the law in Massachusetts (*National Bank of Commerce* v. *City of New Bedford*, 175 Mass. 257), but we see no reason why the court should not use information and reports which people engaged in that business rely on customarily outside of a court room.

Rule 529. (2nd Draft p. 202.) ***Learned Treatises.***

A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in his profession or calling as an expert in the subject.

We do not approve of this rule. It seems to us a dangerous thing to permit juries to have laid before them as evidence treatises and other books such as this rule permits. It could be the subject of very great abuse. It may well be that the Massachusetts rule which forbids cross-examination with respect to the contents of a book (see *Allen* v. *Boston Elevated Railway*, 212 Mass. 191, is too narrow and that the rule prevailing in New Hampshire is better in this respect (*Laird* v. *Boston Maine Railroad*, 80 N. H. 377) but we think it unwise to go as far as this rule goes.

Rule 601. (2nd Draft p. 204.) ***Authentication of Writings; Ancient Documents.***

A writing, offered in evidence as authentic, is admissible, if

(a) sufficient evidence has been introduced to sustain a finding of its authenticity, or

(b) the judge finds that the writing

(i) is at least thirty years old at the time it is so offered, and

(ii) is in such condition as to create no suspicion concerning its authenticity, and

(iii) at the time of its discovery was in a place in which such a document, if authentic, would be likely to be found.

We believe that Rule 601 (a) is so worded that it would lead to many practical difficulties.

For instance, does this mean that the decision of the trial judge on this question in the exercise of his discretion is final, or is it subject to review in each instance by the appellate court? If it does mean that the trial judge's discretion is not reviewable, the

rule is subject to the general criticism applicable to the Code, that the judge has too much power. On the other hand, if the ruling of the trial judge is reviewable by an appellate court in every instance, there seems to be no yardstick to determine what the section means. Other provisions of the Code provide that all relevant evidence is admissible (Rule 9 (f)) and that all provisions of the common law and statutes dealing with the subject matter of these rules or inconsistent with any provision of these rules are abrogated (Rule 12). Considering these various provisions of the Code, what would be the law applicable to a case where a plaintiff desired to prove in a tort or contract action that a certain written statement purporting to be signed by the defendant was an admission of certain facts in the case? Would the plaintiff follow the common law rules heretofore existing and have to prove the signature in any one of the several ways that a signature can now be proved or could he perhaps prove the authenticity of a document by simply showing that by United States mail he received a letter which purported to be signed by the defendant? Some trial judge might say that to him was sufficient evidence that the document was authentic. Would an appellate court perhaps say that to it the paper seemed authentic?

This may be a rather extreme suggestion on our part, but it does seem to us that there should be some more definite provisions as to what is meant by evidence sufficient to sustain a finding of authenticity.

RULE 601 (b) (ii). Why the words "in such condition as to create no suspicion concerning its authenticity"? This seems to establish a scintilla rule and give the judge a right to exclude the evidence merely because there is something about the document that might give him a slight suspicion. If this ground of admissibility is going to be adopted, why not say "in such condition as to make it appear likely that it is authentic"?

Rule 602. (2nd Draft p. 205.) ***Evidence as to Content of Writings; Best Evidence Rule.***

As tending to prove the content of a writing, except an official record, no evidence other than the writing itself is admissible unless

- **(a) evidence has been introduced sufficient to support a finding that the writing once existed and is not a writing produced at the trial, and**
- **(b) the judge finds that, assuming that the writing once existed and is not a writing produced at the trial,**
  - **(i) it is now unavailable for some reason other than the culpable negligence or wrongdoing of the proponent of the evidence, or**
  - **(ii) it would be unfair or inexpedient to require the proponent to produce the writing; or**
- **(c) the writing is one authorized by statute to be recorded in a public office of a state or nation and the offered**

evidence is admissible evidence of the content of the official record of the writing.

We agree here with everything that Professor Wigmore says as to this rule in his article in the January number of the American Bar Association Journal at page 26. He suggests several rules of thumb that should be detailed in sub-section (b) of this rule.

Rule 701. (2nd Draft pp. 214–15.) ***Definitions.***

(1) Basic Fact — Basic fact means the fact or group of facts giving rise to a presumption.

(2) Presumption—Presumed Fact — Presumption means that when a basic fact exists the existence of another fact must be assumed, whether or not the other fact may be rationally found from the basic fact. Presumed fact means the fact which must be assumed.

Rule 702. (2nd Draft p. 215.) ***Establishment of Basic Fact.***

The basic fact of a presumption may be established in an action by the pleadings, or by stipulation of the parties, or by judicial notice, or by evidence which compels a finding of the basic fact, or by a finding of the basic fact from the evidence.

We can see no reason for including this Rule 702 in the Code. A basic fact is, ultimately, no different from any other fact and so can be established in just the same fashion as any other fact. Possibly that is what Rule 902 is designed to show. But if so, it does not require showing, and we are fearful that including a rule setting out how this particular sort of fact is to be established may result in suggesting that there is a distinction as regards a basic fact which truly does not exist. We are convinced that the rule is surplusage, but very possibly harmless.

Rule 704. (2nd Draft p. 216.) ***Effect of Presumptions.***

(1) Subject to Rule 703, when the basic fact of a presumption has been established in an action, the existence of the presumed fact must be assumed unless and until evidence has been introduced which would support a finding of its non-existence or the basic fact of an inconsistent presumption has been established.

(2) Subject to Rule 703, when the basic fact of a presumption has been established in an action and evidence has been introduced which would support a finding of the non-existence of the presumed fact or the basic fact of an inconsistent presumption has been established, the existence or non-existence of the presumed fact is to be determined exactly as if no presumption had ever been applicable in the action.

In an earlier draft, this rule contained additional paragraphs to which the committee strongly objected for reasons stated

at length in the report. These paragraphs having been omitted in the final draft (printed above) we see no objection and the discussion of the discarded paragraphs is omitted.*

We are in sympathy with the endeavor on the part of the drafters of the Code to make order out of chaos on the troublesome question of presumptions. That our present law on the subject is confusing, to say the least, is well known by any person who has looked into the topic. Indeed, even in a given jurisdiction the decisions are not harmonious. A member of the committee after examining the law of Massachusetts found some striking inconsistencies.† In view of the confused state of the Massachusetts law he was of the opinion that it would be better to do away with presumptions entirely and deal with the matter through burden of proof. Thus instead of giving the proponent in proving a will the burden of proving the testator sane and helping him out with a presumption of sanity it would be better to cast the burden of proving the testator insane upon the contestant. While this suggestion is not without merit, the committee feels that this would call for a very drastic change in the substantive law and in various rules dealing with practice and pleading which probably would be beyond the scope of the Evidence Code. We are therefore assuming that presumptions are something we have got to live with for some time to come.

GENERAL REMARKS APPLICABLE TO CODE AS A WHOLE

One general criticism as to which all the members of the committee are in accord is that the Code gives too much power to the trial judge. We agree with what Professor Morgan said in his article on the Code in the American Bar Association Journal for September, namely that the rules ought not to be made on the assumption that a court is "made up of medium or low grade morons presided over by a high grade moron," and we further agree with Chief Justice Hughes that‡ "in a trial by jury . . . the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." Nevertheless we feel, as pointed out by several of our comments, that the Code in its praiseworthy desire to restore to the courts some of the power which from time to time it has lost has swung the pendulum too far. Furthermore, the unlimited discretion which in many instances is given to the court gives the bar practically no standard to go by. Rules

* One statement in that discussion was "Personally we should shed no tears over the abolition of the scintilla rule in Massachusetts."

†Note: See for example, *Clifford* v. *Taylor*, 204 Mass. 358, *Commonwealth* v. *Spencer*, 212 Mass. 438, *Thomas* v. *Meyer Store Inc.*, 268 *Mass.* 587, *Cincotta* v. *DuPuy*, 294 Mass. 298, *Chandler* v. *Prince*, 217 Mass. 451, *Duggan* v. *Bay State Street Ry.*, 230 Mass. 370, *Commonwealth* v. *DeFrancesco*, 248 Mass. 9, *McLoughlin* v. *Sheehan*, 250 Mass. 132, *Claffey* v. *Fenelon*, 263 Mass. 427, *Hughes* v. *Iandoli*, 278 Mass. 530, *Brown* v. *Henderson*, 285 Mass. 192.

‡ *Quercia* v. *U. S.*, 289 U. S. 466 at 469.

105 (j) and 303, previously commented upon, are good illustrations of this. While we agree that certainty and *stare decisis* are not as necessary, in a subject such as evidence, as in various fields of substantive law, nevertheless they should not be entirely ignored. A lawyer in preparing a case for trial likes to have something by way of a chart, though not exact, to help him plot his course. Rules 6 and 7 governing harmless error ought to be sufficient safeguard against new trials for inconsequential errors in regard to evidence. In view of this we do not think the trial judge needs all of the authority that these rules give him.

It must not be thought, from the foregoing, however, that the committee is unmindful of the defects that exist in the law of evidence. Many of these, we feel, have been rectified by the Code, but the Code, if it is to accomplish its purpose, must be something which in the hands of the ordinary practitioner will be workable, clearly understood and not too far removed from reality. It is with these ideas in mind that we have made the foregoing suggestions.

Respectfully submitted,

JOHN V. SPALDING, *Chairman*,

Richard B. Walsh	Neil Leonard
Edward M. Dangel	Edward B. Hanify
Gerald J. Callahan	Edwin G. Norman
Lafayette R. Chamberlin	Charles W. Bartlett
Robert H. Hopkins	Richard Wait
Wilfred H. Smart	Theodore Chase

Commonwealth of Massachusetts

ADMINISTRATIVE COMMITTEE OF DISTRICT COURTS

PROCEDURE ON COMPLAINTS UNDER EMERGENCY EXECUTIVE ORDER AS TO SPEED OF CARS

No. 3

TO THE JUDGES AND CLERKS:

Under date of March 16th last, His Excellency the Governor issued Executive Order No. 8, copy of which you undoubtedly have received. The immediately important part thereof and the subject matter of this communication is found in sections (1) and (3).

> "(1) No person shall operate any motor vehicle on any public way within the Commonwealth at a rate of speed in excess of forty miles per hour, except as provided in General Laws (Ter. Ed.) chapter 89, section 7B, inserted by Acts of 1934, chapter 382."
>
> "(3) Any person who violates the provisions of this order, or of any rule or regulation issued hereunder, shall be punished therefor by imprisonment for not more than one year or by a fine of not more than five hundred dollars, or both."

The legislation authorizing this order is therein stated.

Section 4 of chapter 13 of the Acts of 1942, provides as follows:

> "Any provision of any general or special law or of any rule, regulation, ordinance or by-law to the extent that such provision is inconsistent with any order or regulation issued or promulgated under this Act shall be inoperative while such order or such last mentioned regulation is in effect; provided that nothing in this section shall be deemed to affect or prohibit any prosecution for a violation of any such provision before it became operative."

Our Committee has been asked to advise as to procedure and the form of complaint for excessive speed based upon this order.

It is our opinion that where the evidence offered as a basis for a complaint indicates the speed was in excess of forty miles per hour, the complaint should allege a violation of said Order No. 8, phrased as follows:

> "Did operate a motor vehicle at a rate of speed in excess of forty miles per hour contrary to Executive Order Number 8 promulgated under the provision of Acts of 1941, Chapter 719, Section 7; and Acts of 1942, Chapter 13, Sections 2, (3), (5); and Section 3."

Where the evidence indicates the speed was forty miles or under the complaint should allege a violation of the existing statutory requirements as to speed.

It should be borne in mind that the penalties provided are maximum and cover other offenses than speeding.

Charles L. Hibbard, Chairman

Elbridge G. Davis — Richard M. Walsh

Frank L. Riley — Kenneth L. Nash

Members of Committee.

April 1, 1942.

A LETTER ABOUT ATTACHMENTS FOR CONSIDERATION OF THE JUDICIAL COUNCIL AND A REQUEST FOR MORE SUGGESTIONS

The 17th annual report of the Judicial Council was distributed in the January number of the QUARTERLY. It called attention to the matters referred to the Council by the legislature for study and report and requested suggestions from bench and bar on those or other subjects for the assistance of the Council. Among these subjects were 16 bills involving the whole law of attachment and 3 bills about libel and the law of defamation generally.* One of the letters received is printed below. Several communications about the law of libel and other matters have been received. More suggestions will be welcomed.

* The common law of defamation is restated in the 3rd volume of the American Law Institute's "Restatement of Torts."

A Letter about Attachments

The question of attachments at the beginning of suit, which has been thrown in the lap of the Council, involves a problem of philosophy, and the individual outlook. Some years ago, in 1925, Massachusetts put into effect an automobile insurance law. The basic reason for this, and on the whole one which I consider justified, was that many if not most of the persons injured were poor people, and that many if not most of the persons causing the injuries were irresponsible. I seem to recall the cry that these poor people should not be required to bear the burden of injuries caused by the automobile.

Attachments fit into the same picture. The present cry seems to be that the poor person is imposed on, by having his pay taken before he can prove his innocence or lack of liability, and that the rapacious creditor should wait until he establishes his claim before he can go after the money. Perhaps, this is right, and this letter is not an attempt to prove otherwise, but the attorney who does much collecting would give another side to the picture. One of the difficulties is a certain unevenness on the part of the judges. One will be very strict on a debtor, and the next will be so easy that it is almost impossible to collect a just debt.

Another difficulty with taking away the right to attach is the fact that the debtor is given time either to mortgage property, or to dissipate his assets, including the proceeds of even a genuine mortgage. Among many of the improvident debtors there is an "eat, drink, and be merry, for the sheriff comes tomorrow" attitude. As in war, surprise is sometimes an important weapon.

Very truly yours,

Geoffrey Bolton.

Ayer, Mass., March 30, 1942.

SEVENTH SUPPLEMENT OF NOTES TO THE SIXTH EDITION OF CROCKER'S "NOTES ON COMMON FORMS" PREPARED FOR THE MASSACHUSETTS CONVEYANCERS' ASSOCIATION.

These notes were prepared for the Massachusetts Conveyancers' Association for its members under the terms of the Samuel T. Harris Memorial Fund, and are here included by permission of the Association.

The first six sets of these notes were printed in the Massachusetts Law Quarterly for January-March and July-September, 1939, January-March and July-September, 1940, March, 1941, and November, 1941. The notes may be readily copied into the book, as indicated, for future reference.

NOTES BY R. D. SWAIM, EDITOR, SIXTH EDITION OF CROCKER'S "NOTES ON COMMON FORMS"

The following notes cover Massachusetts decisions of 1941 Advance Sheets, page 1258, to 1941 Advance Sheets, page 1757, and Additional Acts of 1941 after Chapter 339, and various Land Court decisions. References to BTL are to the Banker and Tradesman Legal Edition. *At the left will be found the section in Crocker to which each note is applicable.*

Section

813 *Omitted Child.*

213 Omission must be shown to have been intentional. ADVERSE POSSESSION — by Co-tenant. *Prue* v. *Prue,* Land Court 17821, Reg. 27 BTL 17.

313 *Delivery of Deed.*

314 Date of instrument controlled by facts found. RATIFICATION — of voidable deed found. *Callery* v. *Cameron,* Land Court 15849, 27 BTL 17.

747 *Lease.*

Damages for breach of condition to repair or deliver up in a certain condition. *Crystal Concrete Corporation* v. *Braintree,* 1941 Adv. Sh. 1329.

761 *Lease.*

Continued occupation evidence of exercise of option to extend. *Straus* v. *Sheheen, Inc.,* Land Court 3810 July 25, 1941, 27 BTL 89.

763 *Notice by Registered Mail.*

Found received on facts after receipt signed by agent. *Anderson* v. *Billerica,* 1941 Adv. Sh. 1381.

11 *Eminent Domain.*

Taking for a municipal airport sustained. *Burnham* v. *Beverly,* 1941 Adv. Sh. 1227.

437 *Unrecorded Assignment of Note and Mortgage.*

Assignee holds against creditor of assignor who filed *lis pendens* after the assignment. *Johnson* v. *McCarthy,* Land Court 17751 July 22, 1941, 27 BTL 89.

707 *Defective Title.*

566 Legacies as lien. *Mahoney* v. *Nollman,* 1941 Adv. Sh. 1267.

115 *Easement for Way.*

Admissions by owners in recitals in deeds — WAY BY PRESCRIPTION — REMEDY FOR OBSTRUCTION. *Albano* v. *Puopolo,* 1941 Adv. Sh. 1365.

764 *Promissory Note.*

366 Liability of guarantor of witnessed note where guarantee not under seal. *Charlestown Five Cents Savings Bank* v. *Wolf,* 1941 Adv. Sh. 1417.

Section

370 *Promissory Note.*

Adding "and x. y." and signing x. y. to note drawn "I. A. B." is a material alteration. *Windell* v. *Goldman*, 1941 Adv. Sh. 1345.

502 *Mortgagee.*

Summary Process after Foreclosure — Claim for Improvements under G. L. c. 237, ss. 16, 17. *Anderson* v. *Connolly*, 1941 Adv. Sh. 1427.

707 *Zoning Law.*

Proper procedure for appeal by person aggrieved. *Hull* v. *Belmont*, 1941 Adv. Sh. 1101.

377 *Insurable Interest.*

Must exist on taking insurance and at time of loss but need not have been continuous — discussion of what is. *Womble et al. Trus.* v. *Dubuque Fire and Marine Ins. Co.*, 1941 Adv. Sh. 1563.

237 *Reverter.*

Discharge by conveyance. *Gardner* v. *Boston*, No. 3383 Land Court, 27 BTL 65.

543 *Foreclosure of Mortgage — Soldiers and Sailors Relief Act.*

Foreclosure postponed on terms during military (naval) service of mortgagor. *First Fed. Sav. & Loan Assoc.* v. *Merrill*, Land Court, 3923 Misc. Eq. 27 BTL 233. Postponed on terms. *Bartulis* v. *George*, Land Court 4495 Misc. 27 BTL 249.

But a retired disabled officer of the U. S. Army Reserve Corps not in active service and with no evidence of being absent from duty on account of sickness, wounds, leave or other lawful cause is not within the act. *Natick Fed. Sav. and Loan Assoc.* v. *Butler*, Land Court 3957 Misc. 27 BTL 233.

Military service will not affect foreclosure if property not owned at the commencement of the service. *Provident Institution for Savings* v. *Toury*, Land Court 4397 Misc. 27 BTL 265.

434 *Mortgage.*

Foreclosure by mortgagee after assignment as collateral ineffective. Mortgage belonged to assignee. *Brown* v. *General Trading Co.*, 1941 Adv. Sh. 1711.

366 *Straw.*

Discussion of liability of principal on note of straw. *Central Trust Co.* v. *Rudnick*, 1941 Adv. Sh. 1683.

566 *License for Sale by Administrator* de bonis non.

Within six months or the balance of the original year whichever is longest. Chapter 341.

707 *Zoning.*

Section

178 Boston Law amended. Chapter 373.

767 *Liens for Water.*
Law revised, principally as to the method of collection and release of liens. Chapter 380.

867 *Inheritance Taxes.*
New table of rates. Chapter 415 and surtax extended. Chapter 416. See also Chapter 605.

End. Chap. *Boston.*
XXI Fire egress from buildings—lien for expense by building commissioner. Chapter 445.

End Chap. *Boston.*
XXI Buildings inspected or dangerous to health — lien for expense of health commissioner. Chapter 446.

255 *Easements for Slope on State Highways May Be Taken.*
Chapter 519.

707 *Airport Regulation Authorized.*

135 Similar to zoning but damages allowed. Chapter 537.

81 *Uniform Simultaneous Death Law.*
Disposition of property. Chapter 549.

765 *Separate Taxbills and Payment of Taxes on Separate Parcels Authorized.*
Chapter 573.

885 *Low Value Lands.*
Tax sales and proceedings to establish title. Chapter 594.

766 *Betterment Assessments.*
4% interest. Chapter 595.

ROGER D. SWAIM.

REGIONAL CONFERENCE OF BAR ASSOCIATION OFFICERS

We are requested by L. Stanley Ford, Esq., chairman of the Section of Bar Organization Activities of the American Bar Association, to extend, to the officials of the county and other bar associations in Massachusetts, an invitation to the Regional Conference of Bar Association Officers and others, to be held on Saturday, May 16th, 1942, at the House of the Association of the Bar of the City of New York, 42 W. 44th Street.

OUTLINE OF DISCUSSION OF PROBATE COURT PROCEEDINGS ON MAY 8TH

First, probate accounting, with particular reference to some system of compulsory regular accounting by trustees and other fiduciaries. Weld A. Rollins will present the arguments in favor; Harold T. Davis the arguments against. Judge Arthur L. Eno, of Lowell, will follow on some phase of it.

Second, the guardian *ad litem* problem. Guy Newhall will discuss the nature of the problem. Bradley B. Gilman, of Worcester, will follow with a suggestion of proposed remedies. Homans Robin, of Springfield, will join in the discussion.

Third, the question of enlarging the jurisdiction of the probate court so that all the claims, either by or against a fiduciary, can be enforced in the probate court. William E. Fuller, of Fall River, will present arguments in favor; and Frederick M. Myers, of Springfield, will present reasons against the idea.

NOTE

The first object was discussed in the *Bar Bulletin* for July, 1941, pp. 161–163, September 1941, p. 186; December 1941, p. 289, by Messrs. Shattuck, Luther, and Keyes, and December 1941 by Judge Hitch, chairman of the Administrative Committee of the Probate Courts.

The second subject was discussed in MASS. LAW QUART. for July–September, 1938, pp. 10–17; April–June 1939, pp. 19–26; and *Bar Bulletin*, September 1941, p. 188; and see 13th Report of Judicial Council, pp. 42–43 (23 MASS. LAW QUART. No. 1).

As to the third subject — the present jurisdiction should be studied under St. 1915, C. 151 (now scattered, see below), and under St. 1922, C. 512 and St. 1938, C. 154, in connection with G. L. (Ter. Ed.) C. 205, Sec. 7A, last sentence. See also 7 MASS. LAW QUART. No. 4, 42–46 (May, 1922) and Newhall, "Settlement of Estates," 3rd Ed., Sec. 42, pp. 112–113. The act of 1915 was drafted by the late John L. Thorndike for the Massachusetts Bar Association to provide general equity powers to do many things directly, without suits in other courts. It is now scattered as follows: §§ 1 and 2 are now G. L., C. 197, §§ 19 to 20; § 3 is G. L. 206, § 4; § 4 is in C. 197, § 24 and C. 198, § 22; § 5 is in C. 197, § 24; § 6 is G. L., C. 215, § 239; § 7 is C. 230, § 5; § 8 is C. 215, § 34. They were all intended to be read together.

The act of 1922 was proposed by the Massachusetts Bar Association; and the act of 1928 by the Administrative Committee of the Probate Courts and the Judicial Council (12th Report, 22 MASS LAW QUART. No. 1, Suppl. 47–48).

As to claims against estates, see draft act proposed by the Judicial Council in the 5th Report, 33-34 (MASS LAW QUART., December 1929).

LAW IN FEDERAL AREAS WITHIN STATES

Members of the bar having to consider legal problems arising in Federal areas may be interested to know that the *Tennessee Law Review* for April, 1942, just received, contains an extended study of the law in such areas by Francis W. Laurent, Esq., of the Tennessee and Wisconsin bars, now on duty in the office of the Judge Advocate of the Navy.

COMPARATIVE NEGLIGENCE IN TORT CASES

The *South Dakota Bar Journal* for April, 1942, just received as we go to press, contains an interesting discussion by various judges in that state, of the problem of charging juries under the new comparative negligence law of 1941, which is the same as the Nebraska statute. Wisconsin also has a comparative negligence statute and the practice of apportioning damages in accordance with the relative negligence of the parties appears to be in force in Canada. While the practice is adapted from that familiar in admiralty in collision cases, and suggestions have been made that a similar practice be considered in Massachusetts, the matter has not received much attention. In view of the fact that it appears to work in other jurisdictions, even with juries, and that the Lord Chancellor's Law Revision Committee in England, consisting of distinguished judges and lawyers headed by Lord Wright, recommended the adoption of a similar practice in England, in its 8th Report in 1939, it may be worthy of study by the bench and bar in Massachusetts.

In the report of the Lord Chancellor's committee, after referring to the fact that the admiralty principle has been adopted by legislation in Canada and in some of the American states so that damages are dependent on the amount of negligence attributable to each party when there was contributory negligence, the committee says:

> "So in continental law, the general principle is that the court has a discretionary power to reduce damages or to extinguish them altogether in proportion to the degree in which the plaintiff has contributed to cause the accident. The common law rules of contributory negligence have no counterpart in any system other than the Anglo-American systems of law.
>
> "No doubt it is possible to conceive objections to the change which we propose, but we doubt if they have any substantial foundation. It is, for example, possible to suggest that the result of apportioning the damages may be to cause a great increase in litigation. Possibly the expectation of a pedestrian that he will be able to obtain some compensation when he is injured by a motorist, even though he himself may be to some extent to blame, may incite him to bring an action which, at present, would be likely to fail. If, however, the fault is only partially his, we think that justice rather than injustice will be done even if some increase in litigation takes place, but in deed, we do not think that any startling increase will result. The experience in Ontario where such a rule has been in existence since 1924 is that the total amount of damages recovered by plaintiffs is not increased to any marked extent. The increase in the number of cases in which damages have been obtained is said to have been offset to a large extent by the decrease in the amount of damages awarded in those cases where the plaintiff's negligence has contributed to the result, and this contention seems to be borne out by the fact that the Canadian insurance rates have not increased in recent years.
>
> "It may also be objected that it will be difficult for a jury to determine the degree of blame attributable to each party and to apportion damages accordingly. In our view it will be less difficult for them to do so than it is to determine the cause to which the accident must be attributed, and if, as is suggested, the matter is to be dealt with on broad lines, we think any reasonable jury can assess the damages with sufficient accuracy.
>
> "The Admiralty Court has no difficulty in apportioning the damages under its rule, and though in that case the decision is that of a judge and not of a jury, the experience of the courts in Canada seems to show that a jury is also capable of making the required apportionment."

F. W. G.